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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

ANSWER BRIEF OF PETITIONER THE CITY OF CLEVELAND.

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STATEMENT.

This brief is in answer to the briefs of the respondents, the Public Utilities Commission of Ohio and the Cleveland Electric Illuminating Company. Both respondents oppose Cleveland's "Petition for Writ of Certiorari to The Supreme Court of the State of Ohio."

Cleveland in this case retains its historic role as a representative of the ratepayers located within its municipal boundaries. The respondents' contentions to the contrary are not supported anywhere in the evidence of this case. Cleveland's role as a representative of the ratepayer has been a very long and distinguished one. For instance, it was the activity of the City of Cleveland before the Federal Power Commission which resulted in the most important landmark case in the field of utility law: *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944).

ARGUMENT.

I.

CLEVELAND HAS PRESERVED ITS RIGHTS.

The Public Utilities Commission of Ohio (hereinafter referred to as the "Commission") submitted only one argument against Cleveland's petition. The Commission, for the first time in this case argues that Cleveland has not preserved its rights to appeal the matters brought before this Court. The fact that the Commission did not choose to make this argument in its answer brief before the Supreme Court of Ohio indicates the lack of substance in the Commission's argument.

The initial brief of Cleveland before the Supreme Court of Ohio was replete with argument about all of the Federal questions presented in our petition. For instance, the very first argument presented in our initial brief was headed as follows:

"ARGUMENT.

PART I.

THE RATES SET BY THE COMMISSION CONFISCATE THE RATEPAYER'S PROPERTY IN VIOLATION OF FEDERAL LAW.

The Fourteenth Amendment to the Federal Constitution Protects the Consumer Against Confiscation of His Property Through Excessive Utility Rates."

The weakness in the Commission's sole argument against Cleveland's petition is further illustrated by the failure of the Cleveland Electric Illuminating Company to even mention in its brief the argument presented by the Commission. The Supreme Court of Ohio has said nothing to indicate that there was any procedural defect in the Federal questions raised in Cleveland's notice of appeal

and briefs before the Supreme Court of Ohio except in respect of the retroactive application of the rate increase.

The Commission bases its argument upon defects which it now claims exist in our notice of appeal to the Ohio Supreme Court. Again, using the first question presented in our petition as an example, it should be noted that nine of the citations of error in our notice of appeal (Numbers 44 through 52 shown on pages 14 and 15 of the Commission's brief in opposition to Cleveland's petition) list the salient facts which support Cleveland's contention that through excessive rates the Commission confiscated Cleveland's property and the property of the other ratepayers contrary to the Fourteenth Amendment to the Federal Constitution.

Cleveland sharply raised the constitutional questions of the denial of due process of law under both Ohio and Federal law by stating these issues in the language adopted by the Commission itself. The Commission in the very last paragraph of its discussion of the case (page 34 of Cleveland's petition) stated:

> "Fourth, counsel urges that the Fourteenth Amendment to the United States Constitution with regard to due process and equal protection of the laws are violated by the laws of Ohio. Since the Commission is not empowered to pass on the constitutionality of statutes it is given to administer, the Commission does not attempt to decide the issue in its various ramifications." (Emphasis added.)

Cleveland in its fiftieth assignment of error stated:

> "That the increase in steam rates granted in this case is so far in excess of the applicant's earnings requirements and so far beyond a generous return that it is an unconstitutional application of our statutory rate making formula." (Emphasis added.)

II.

"CLEVELAND INTRODUCED THE ONLY EVIDENCE ABOUT WHAT RETURN WOULD CONFISCATE THE RATEPAYER'S PROPERTY * * *."

The heading for this argument is copied from page 12 of our petition. The respondents have failed to show one iota of evidence in contradiction of that statement.

The Company did have two witnesses on rate of return. Their testimony touched only upon the abstract subject of a fair rate of return on a rate base that is divorced from reality. The Company's witnesses did not concern themselves with the Company's actual earning requirements.

Moreover, the Commission admitted that it did not concern itself with the actual earning requirements of the Company. The Commission claims that it is under no compulsion to deal with the realities of the Company's needs.

The Commission based this conclusion upon the decisions of the Supreme Court of Ohio which "* * * have held that the actual earnings requirements of a company 'are not really material in a proceeding of this kind.'" (Petition, Appendix A, p. 31.) The Commission has further stated that it was not empowered to pass upon constitutional questions (Petition, Appendix A, p. 34).

The Company misleads this Court by suggesting that the issue of confiscation raised by Cleveland involves the weight of evidence between the sharply conflicting testimonies of several rate of return witnesses. *This case involves the willful failure of the Commission to consider the only evidence* about what return would confiscate the ratepayer's property.

The only evidence concerning what would constitute a confiscatory charge was presented by Cleveland Witness

Honaker, who testified that the maximum allowable return is $525,000 per year (Tr. 2451). He showed that such a return would consist of an 8% rate of return on composite capitalization and a 13% rate of return on the common equity portion thereof (Tr. 2451). Mr. Honaker testified that even that return might be excessive. He stated on pages 2451-2 of the record that

> "Anything beyond this is completely out of line with the generally accepted concept of fair return. In fact, these percents are entirely too high and at first blush shock the conscience, but my stated opinion is premised upon an extreme situation, i.e., earnings outside a broad and generous zone."

The Commission willfully disregarded this evidence and on page 9 of its final order in this case determined that "* * * The dollar return to which applicant is entitled for purposes of this proceeding is $680,311.11 * * *." (Petition, Appendix A, p. 34.)

The Company has overstated the holdings of the cases which it has cited. For instance the case of *Hollis v. Kurtz*, 255 U. S. 452 (1921) is *sui generis*, since it involved a special price advantage that was bargained for by the Federal government. In the *Hollis* case the utility did not earn an excessive return on its total operations as in the instant case.

III.

THE COAL ESCALATION FORMULA.

The Company has said nothing which really challenges the point made by Cleveland in its petition which stresses that the Commission has given the Company the unrestrained power to adjust its rates in accordance with a coal escalation formula. Cleveland has shown in its petition that this clause has not worked effectively at any time

during its forty years of existence. Cleveland showed that if the cost of coal went up one dollar over the last decade, the Company's charges to its customers would increase by one dollar and forty cents.

How else can the actual facts of the operation of this coal escalation formula be explained except by the obvious conclusion that the Commission never checks into the working of such formulae and that the Commission has thereby in effect unconstitutionally delegated its regulatory powers to the Company? The only assertion that the Company has been able to make to the contrary is its claim that it files monthly reports with the Commission. It is quite evident that *the Commission does no more than entomb these reports* in its files.

If the Commission actually exercised its regulatory authority over these escalation formulae, the cases cited by the Company in support of the allowance of escalation formulae would be in point. Each of the cases cited by the Company is predicated upon the proposition that the regulatory body in question had not abandoned its administrative functions. In this case the Commission has abandoned its regulatory function for over forty years.

IV.

THE COMMISSION HAS ARBITRARILY GRANTED A DISCRIMINATORY RATE INCREASE WHICH VIOLATES THE PETITIONER'S FREEDOM OF CONTRACT.

This is the *only one of the errors* claimed in our petition *concerning which the Supreme Court of Ohio has raised any procedural questions.* The Supreme Court of Ohio has stated:

> "This matter of the date on which the rate increase was first charged to the customer is a matter between

> the customer and the company which will not be considered by this court in this appeal from an application of the company to the Public Utilities Commission for an increase in its rates and charges." (Petition, Appendix B, p. 39.)

This error arises from the order of the Commission that "* * * such tariff schedules may become effective on the first billing date subsequent to the filing of such tariff schedules." (Petition, Appendix A, p. 35.) The natural means for seeking relief from the oppressive features of this order is through an appeal of the order itself, instead of through collateral proceedings. Cleveland has chosen the obvious natural means for redressing this error.

The Supreme Court of Ohio does not suggest any alternative route that Cleveland can or could have taken to seek relief from the discriminatory manner in which the rate increase was put into effect. The Supreme Court of Ohio did not suggest such an alternative because there never has been such an alternative. The Company has not suggested an alternative because there is no alternative. The ratepayer's constitutional rights cannot be denied because of an erroneous suggestion that he might have some other means of relief.

The Company has offered nothing in contradiction of our point that the method set by the Commission for effecting the rate increase violated the ratepayer's freedom of contract. The Company has conceded on page 18 of its brief that the rate increase was applied in a discriminatory manner:

> "* * * The record does not show how any particular customer was affected. It does show that each customer was probably affected differently."

CONCLUSION.

The City of Cleveland is before this Court because both the Commission and the Supreme Court of Ohio have refused to consider the rights of the ratepayer under the Fourteenth Amendment to the Federal Constitution. The Commission has forthrightly stated that it would not pass upon questions of Federal law. The Supreme Court of Ohio has been silent upon these questions. These questions are of enormous importance and should not be ignored.

WHEREFORE, the petitioner prays that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio entered on July 7, 1965, and the "Findings and Order" of the Commission of January 8, 1963, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

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